

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401435

MARK S. HUFF, EMPLOYEE	CLAIMANT
A B C SUPPLY COMPANY, INC., EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 8,2004

Hearing before Chief Administrative Law Judge David Greenbaum on November 5, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Scott Willhite, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. E. Diane Graham, Attorney-at-Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 5, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing telephone conference was conducted on September 1, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to additional stipulations agreed to at the hearing. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was agreed that the employee/employer/carrier relationship existed at all relevant times, including January 20, 2004; that the claimant earned sufficient wages to entitle him to compensation rates of \$303.00 per week for temporary total disability and \$227.00 per week for permanent partial disability; that respondents paid various medical and indemnity benefits prior to controverting the claim in its entirety. At the hearing, the parties stipulated that respondents paid various medical, as well as temporary total disability through April 4, 2004, prior to controverting the claim in its entirety. In addition, it was agreed that the claimant also received both short-term disability benefits and long-term disability benefits, and that some of his medical expenses were paid under the employer's group health insurance, and that, in the event the claimant prevailed, respondents would be entitled to a dollar-for-dollar offset for benefits paid under A.C.A. §11-9-411.

By agreement of the parties, the primary issue concerns compensability. If overcome, claimant's entitlement to associated benefits must be determined.

At the prehearing conference, the claimant contended, in summary, that he sustained a compensable injury to his right shoulder as the result of a specific incident identifiable in time and place of occurrence on January 20, 2004; that he was entitled to temporary total disability benefits from February 5, 2004, and continuing through the present, while maintaining that his healing period had not ended; that respondents should be held responsible for all medical and related

treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to all benefits paid and/or to be awarded. At the hearing, the claimant amended his contentions to conform with the stipulations and requested additional, temporary total disability beginning April 5, 2004.

The respondents contended that the claimant's alleged injury was not compensable, specifically, maintaining that there was no objective and measurable findings to support an injury.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the November 5, 2004, hearing containing a joint medical exhibit consisting of forty-nine (49) pages which was introduced as "Joint Exhibit A," together with a three (3) page, supplemental medical exhibit introduced by the claimant, without objection, as "Claimant's Exhibit A."

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder as the result of a specific incident identifiable in time and place of occurrence at the workplace on January 20, 2004. Specifically, the claimant has failed to establish an injury supported by objective and measurable findings as required by the Act.

DISCUSSION

_____This claim turns entirely upon the claimant's credibility. As will be discussed further below, the nature of the alleged injury was not witnessed by any co-workers. Further, respondents exercised good faith in meeting its obligations under our workers' compensation laws by accepting the claim as compensable and providing the claimant with prompt medical treatment, as well as payment of indemnity benefits prior to controverting the claim in its entirety. Respondents subsequently controverted the claim based upon a lack of objective medical findings. As will be set out further below, the only objective medical findings appear to be related to a pre-existing condition, without evidence of any new injury or aggravation of the pre-existing condition. Rather, the medical evidence indicates that the various medical providers conclusions are based upon the claimant's subjective complaints, as well as the claimant's active range of motion related to movement of his shoulder and arm without

objective and measurable findings by the providers. A claimant's testimony is never considered uncontroverted. In fact, the testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The claimant's description of the alleged injury is set out below:

Q All right. Now, on January 20th what were you doing when you were injured?

A We had gotten a call over the two-way radio back in the warehouse that there was a customer coming around to pick up one bundle of shingles. It was the architectural type shingles which weigh approximately 80 pounds a bundle. I picked up that bundle of shingles and placed it on my shoulder to carry it outside to the customer. As I placed that bundle of shingles on my shoulder, there was pain in my shoulder as I placed it on there. I didn't think a whole lot about it at that time, because many times you place a heavier weight on your shoulder such as that, when you take that off the pain is gone. That time the pain didn't go away. Whenever the customer actually came, I placed it over on my left shoulder because the right shoulder was still hurting. I placed it over on my left shoulder to pick it up from the outside to carry it on out to the vehicle. There was pain, but whenever I took it off, the pain was gone, but it never did leave the right shoulder.

Q Now, when you say you placed the bundle of shingles on your right shoulder, did you gently place them down there?

A Just a normal placement of picking a bundle of shingles up off the stack and flipping them over on your shoulder.

Q So there was some impact when the shingles hit your right shoulder?

A Yes, there would be some.

Q Okay. Now, was the pain, did it develop later, or did it develop immediately after the shingles hit your right shoulder?

A Well, as I said, there was pain when I placed it there. Normally, in a situation like that, whenever you remove the weight, the pain goes away. It's more of a weighty type pain. As the day progressed, the shoulder kept getting sorer and sorer and more pain, and that night I definitely knew that I'd done something.

Q So I assume that that night the pain had gotten severe?

A Yes.

Q And how did your problems or pain with your right shoulder develop for the next week or so?

A From that point it pretty well leveled out. On Thursday I told my boss that I had done something to my shoulder. I thought it was just a fleeting thing at first. I told my boss on Thursday I had done something to my shoulder, I did not know what, and it continued to hurt. I told him again on Friday. I was driving one of the trucks uptown to get an estimate on painting it. It was hurting me to shift. I advised him of that. He was in the truck with me at that time to get the estimate. Over the weekend it just hurt so badly that I told him on Monday, "Hey, I need to go to the doctor and get this checked out. It's not getting any better."

Q Okay, let's back up. You said on Thursday, was Thursday the day that you put the shingles on your shoulder?

A No, Tuesday was the day I put the shingles on my shoulder.

Q So the initial event happens on Tuesday. Do you tell anyone at work on Tuesday that you're having problems?

A One of the guys that I worked with was there.

Q Was he in any supervisory capacity?

A No.

Q This was just a co-worker?

A Right.

Q And what was his name?

A Robby Sells.

Q Okay. And when is the very first time you told someone who was in a supervisory capacity over you at ABC?

A On Thursday.

Q All right. Who was that?

A Nick Brunner.

Q Nick Brunner?

A He is the manager. (Tr.11-14)

The record reflects that approximately one week later, the claimant requested medical treatment. The claimant was first sent to the Antosh Medical Clinic in Jonesboro, Arkansas, on January 28, 2004, where he was initially examined by Dr. Darlene Antosh. The history contained in Dr. Antosh's clinic notes is consistent with that described by the claimant. Dr. Antosh conducted a clinical examination and also order multiple x-rays which failed to indicate any evidence of fracture or dislocation of the shoulder. Dr. Antosh diagnosed a right shoulder strain. Suffice it to say that her notes fail to contain any objective finding of injury such as swelling, discoloration, spasm, or crepitus. Rather, it appears that Dr. Antosh treated the claimant's symptoms and complaints of pain. Dr. Antosh placed the claimant's right arm in a sling

and released the claimant for modified duties, specifically, non use of the right shoulder until rechecked on February 3, 2004. Dr. Antosh did note restrictions of motion due to pain without commenting as to whether the restrictions were self-limiting based upon an active range of motion; however, when the claimant returned to Dr. Antosh on February 3, 2004, he had a full passive range of motion with the same limitations and complaints of pain when actively moving his arm in all directions. Dr. Antosh treated the claimant conservatively with medications, and referred him to physical therapy. (Jt. Ex. A, pp.2-7)

The claimant was initially examined and evaluated by Dr. Jim Keller with the American Physical Therapy Center on February 4, 2004. Apparently, Dr. Keller last saw the claimant on June 30, 2004. Again, the only restricted range of motion reflected in Dr. Keller's treatment notes relates to the claimant's active range of motion. Whenever Dr. Keller performed a passive range of motion, the claimant exhibited a full range of motion. No objective and measurable findings were noted to establish a specific injury. It should be pointed out that after almost five (5) months of treatment, Dr. Keller indicated that the claimant had no signs of muscle atrophy. Further, in his treatment note of June 1, 2004, he comments that the claimant reported working on an air conditioning over the weekend, without any shoulder pain while, at the same time, reporting no relief with medication and being very guarded about his right shoulder. The record reflects that the claimant has not returned to any gainful

employment since the January 20, 2004, alleged injury. The claimant has, at all times, received conservative treatment for his complaints. (Jt. Ex. A, pp.35-39)

As reflected by the stipulations, respondents paid related medical, as well as temporary total disability through April 4, 2004, at which point it controverted the claim in its entirety based upon a lack of objective medical findings. It appears that respondents controverted the claim after additional diagnostic studies recommended by Dr. Antosh, specifically, a MRI taken March 29, 2004, failed to reveal any objective evidence of injury. Rather, the only objective findings concerned minimal degenerative changes in the shoulder joint and a trace amount of subacromial bursal fluid. (Jt. Ex. A, p.26)

After the respondent/insurance carrier terminated workers' compensation benefits, the claimant continued to receive medical treatment from the employer's group health insurance provider. In addition, the claimant applied for, and received, both short-term and long-term disability benefits. The claimant was receiving long-term disability benefits at the time of the within hearing which appear to be in excess of his workers' compensation benefits. In addition to treatment by Dr. Antosh and the physical therapist, the claimant was also referred to an orthopedic surgeon for an examination and evaluation. The claimant was initially examined and evaluated by Dr. Claiborne L. Moseley, with Arkansas Orthopedics, P.A., in Jonesboro, on May 19, 2004. Dr. Moseley

diagnosed bursitis of the right shoulder with some AC arthrosis. Dr. Moseley recommended additional physical therapy for six (6) weeks. The claimant returned to Dr. Moseley on July 1, 2004. Dr. Moseley's illuminating report is set out in its entirety below:

Comes back to see me and tells me his shoulder is still killing him. He has been working with Dr. Jim Keller and has regained all of his passive ROM. He goes on to tell me that the injection that I had given him had not helped at all. He also tells me that Workman's Compensation has denied his claim and that he has talked with a number of attorneys, the latest of which had told him that if I would just write a letter to the Workman's Comp. folks that would be able to fix this.

PHYSICAL EXAM: Today, I can take him through a normal passive ROM. He c/o pain at the last 15° of extension and the last 20° of abduction and the last 15° of forward flexion but there is no shift. He doesn't seem to hurt at all through the impingement arc. He is c/o pain with adduction across the chest but can fully adduct. There is no atrophy whatsoever and I don't appreciate any grinding or popping on that side.

I had a phone conversation with Dr. Keller who told me that when he has been able to distract Mr. Huff, it seems that he has had essentially normal function in that shoulder.

ASSESSMENT: Continued complaints of R shoulder pain **w/o objective cause or problem.**

PLAN: I'll discharge him from here. We'll see if he can get another opinion from Dr. Stroope. I don't think I have anything else to offer. (Jt. Ex. A, p.47) (Emphasis supplied)

The claimant has also been examined and evaluated for a second opinion by Dr. Henry F. Stroope, an orthopedic surgeon in Jonesboro, Arkansas. Admittedly, in a reply to an inquiry from claimant's attorney, Dr. Stroope checked a form stating that it was his opinion, to a reasonable degree of

medical certainty, based upon information presented to him, including a patient history provided by the claimant, that the incident of January 20, 2004, resulted in a right shoulder injury which was supported by objective findings, that the claimant needed surgery to repair the damage, and that the accident was the major cause of his injury. However, a review of Dr. Stroope's earlier, July 13, 2004, report reflects inherent inconsistencies between his medical opinion and his earlier assessment. Although the July 13, 2004, report did confirm objective medical findings of a pre-existing condition, specifically, AC joint arthritis and possible tendonitis, there was no objective findings of any injury or aggravation. Rather, it appears that Dr. Stroope recommended an arthroscopy of the right shoulder merely as an exploratory procedure to determine whether any injury could be found. (Cl. Ex. A, pp.1-3)

A portion of Dr. Stroope's July 13, 2004, report follows:

Physical exam of the patient's right shoulder is performed today. The patient is tender over the right AC joint of the shoulder. He also has some tenderness over the greater tuberosity and positive impingement signs. He has no instability of the right shoulder joint which I can determine on examination. He has full motion in his shoulder although it does reproduce pain. There is no atrophy of the shoulder girdle musculature and scapulothoracic motion appears to be normal.

X-rays of the patient's right shoulder including a full impingement series are reviewed. The x-rays show some AC joint arthrosis with cystic change in the distal clavicle adjacent to the AC joint. Other than that, he has a type II acromion process on the outlet view and the glenohumeral joint appears to be normal. Review of the patient's MRI scan is carefully reviewed today. The patient does have some **supraspinatus tendonopathy**, but no definite rotator cuff tear. He also has some **AC joint arthrosis** as documented by MRI scanning.

My assessment of Mr. Huff is that he has **AC joint arthrosis of the right shoulder** which I believe was **most likely aggravated** by his lifting the bundle of shingles onto his shoulder and **this could have aggravated his arthrosis and he could have had continued shoulder pain ever since**. In addition to that, I believe that he does have some subacromial impingement and my therapeutic regimen would include arthroscopy of the right shoulder with inspection of the intra-articular and extra-articular portions of the glenohumeral joint as well as distal clavicle excision which could be done arthroscopically. Also **if he is indeed found to have any sort of injury to the rotator cuff**, that could also be addressed at the same operative setting. My recommendation is that he seek consultation with his current attorney and possibly even get another opinion from another shoulder surgeon prior to reopening his workmen's compensation case to proceed on with surgical treatment. He will follow up with me after this issue is resolved. (Jt. Ex. A, p.48)(Cl. Ex. A, p.1) (Emphasis supplied)

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of employment;
2. proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

Mikel vs. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant must prove that his injury was “the result of an accidental injury that arose in the course of employment, and that it grew out of, or resulted from, the employment.” *Cook vs. Aluminum Co. of America*, 35 Ark. App. 16, 21, 811 S.W.2d 329, 332 (1991); *See also*, Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2002). Objective findings are those findings which cannot come under the voluntary control of the patient/claimant. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2002). Complaints of pain, *per se*, may not be considered by the physician, the administrative law judge, the Commission, or the Courts. Ark. Code Ann. §11-9-102(16)(A)(ii)(Repl. 2002).

Under our workers’ compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple vs. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. *Oliver vs. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup vs. Regalware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury

with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. vs. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996); *Ford vs. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Suffice it to say that an exhaustive analysis of the medical evidence fails to establish any injury supported by objective findings. Admittedly, the medical record does reflect objective findings of joint disease or arthritis, but, without evidence of any new injury or aggravation to the pre-existing disease which is required under our Act. Active range of motion, which comes under the voluntary control of the claimant, and complaints of pain cannot be considered as objective findings under the Act. See, *Hayes vs. Wal-Mart Stores, Inc.*, 71 Ark. App. 207, 29 S.W.3d 751 (2000).

Again, all of the objective findings relate to pre-existing conditions without evidence of new injury. Dr. Stroope's conclusions appear to be based solely on the claimant's complaints and self-limitations.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d

629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met his burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); Wade vs. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler vs. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he sustained a compensable injury established by medical evidence supported by objective and measurable findings. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge